

***United States Court of Appeals
for the Second Circuit***



APPENDIX

75-6063

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

J. C. B. SUPER MARKETS, INC.,
Plaintiff-Appellant,

VS.

UNITED STATES OF AMERICA, and
UNITED STATES DEPARTMENT
OF AGRICULTURE,
Defendants-Appellees.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE WESTERN DISTRICT OF
NEW YORK, CIVIL ACTION No. 1970-232.

APPENDIX

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TESTIMONY.

Witness for Defendant:

Crum, Annie Mae

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CIVIL DOCKET
UNITED STATES DISTRICT COURT

Docket Entries.

E. W. T. M.

Jury demand date:

J. C. Form No. 106 Rev.

Civ-1970-232

TITLE OF CASE

ATTORNEYS

J. C. B. SUPER MARKETS, INC.

v.

UNITED STATES OF AMERICA and
UNITED STATES DEPARTMENT OF AGRICULTURE

For plaintiff: Grover R. James, Jr.
Hodgson, Russ, Andrews, Woods &
Goodyear
1800 One M & T Plaza
Buffalo, New York 14203

For defendant: ~~XXX Kenneth X Schroeder, XXX~~
U.S. Attorney

REMOVED

STATISTICAL RECORD

COSTS

DATE

NAME OR
RECEIPT NO.

REC.

DISB.

J.S. 5 mailed

Clerk

5-21-70

47525

15.00

MAY 22 1970

J.S. 6 mailed

Marshal

*Secretary of the
U. S. Office*

15.00

Basis of Action:

Docket fee

Food Stamp Program

Witness fees

Action arose at:

Depositions

Docket Entries.

Civ-1970-232 J. C. B. Super Markets, Inc. v. USA & U.S. Dept. of Agriculture

DATE 1970	PROCEEDINGS	Date Order Judgment No
May 21	Filed Complaint	
21	Issued summons & 4 copies	
21	Filed Order to Show Cause why a temporary stay should not be granted, etc.-ret. 6/24/70 Curtin, J. adj. 8/5/70, 9/4, 10/16	F-11
21	JS 5 made	
June 8	Filed summons-served 6/4/70	
26	" Order that the argument of the Order to Show Cause be adjourned to 8/5/70, etc.-Curtin, J. (notice & copy to Mr. Schroeder)	F-11
July 23	" Deft's. Answer	
Sept. 1	" Pltf's. Interrogatories	
Nov. 27	" Govt's. Answer to Pltf's. Interrogatories	
27	Return date for motions; no appearance for Pltf.; No adjourned date; Asst.U.S. Atty. Flierl appears for Govt.	
1971		
1972		
Feb. 11	Mailed notice re dismissal to Mr. James & U.S. Atty. - OFF	
Mar. 1	Filed Deft's. Notice of Motion for an order granting summary judgment-ret. 3/17/72; adj. 4/7/72-Govt. brief due 4/21/72; Pltf. brief due 4/28/72	4/28/72
17	" Pltf's. Affidavit in Opposition to Defts'. motion for summary judgment	
Apr. 5	" Asst. US Atty. certification of verification re Govt's. Answer to Pltf's. Interrogatories	
5	" Affidavits of Annie M. Crum, Solomon Goodman, Philip B. Abramowitz & Gloria Czerwik	
19	" Subpoena & Mar. ret. on Subpoena-served 4/5/72 Annie Mae Crum	
Dec. 15	" Pltf's. Affidavit submitted in opposition to defts'. reply affidavits dtd 4/6/72	
15	" Decision & Order denying motion for Summary Judgment. Curtin DJ Notice & copies Messrs. James & Abramowitz	F-135
1973		
June 28	Set date for trial. Court directs trial to begin July 30.	
July 30	Trial before Judge Curtin w/out Jury	
July 31	Trial continued	
Aug. 2	Filed Civil Subpoena to Annie M. Crum and subpoena to Solomon Goodman with Marshal ret. served 7-30-73.	
31	Filed Ct Steno. minutes of 7-30-73.	
1974		
1975		
Apr. 14	Filed letter to Judge Curtin from Grover R. James., Jr. dated 4-11-75	
7	Defts. reply due. No more memos to be filed.	
June 10	Filed Pltfs. memorandum of law submitted in opposition to defts'. motion for summary judgment.	
10	Filed Pltfs. memorandum of law submitted in opposition to defts'. motion for summary judgment upon Court's request.	
10	Filed defts. memorandum of law in support of motion for summary judgment	
10	Filed defts. trial memorandum	
10	Filed Pltfs. preliminary statement.	
10	" Defts. memorandum of law	
10	" Pltfs. requests for findings of fact.	
10	" Pltfs. memorandum of law	
10	" Defts. findings of fact.	
10	Filed decision & order directing the clerk to enter judgment in favor of the defts. dismissing the complaint-Curtin, DJ Notice & copies to Grover R. James, Jr. and U.S. Atty.	F-1

3
Docket Entries.

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF		DEFENDANT	DOCKET NO. <u>1970-232</u>
J.C.B. Super Markets, Inc.		U.S.A & 1	PAGE <u>2</u> OF <u>2</u> PAGES

DATE	NR.	PROCEEDINGS
June	10	Filed judgment in favor of the defts. dismissing the complaint F-165 -Clerk Notice & copies to Grover R. James & U.S. Atty.
	10	JS 6 made
	19	Filed Pltfs. notice of motion for an order staying defts. from disqualifying the pltf. from participating in the Food Stamp Program etc. ret. 6-30-75 Submitted.
	27	Filed defts'. response to motion for a stay of judgment.
July	1	filed letter to Judge Curtin from Grover R. James, Jr., dated 6-30-75
	7	" Pltf's. Notice of Appeal (copy mailed to U.S. Atty. and to Clerk, CCA with copy of docket entries; CCA's Forms C and D mailed to Mr. James)
	10	" Order granting Pltf's. application for stay of judgment until further order of this court or Court of Appeals- Curtin, DJ (notice & cy. to Mr. James and U.S. Atty.) F-165
	8	" Ltr. dtd. 7/7/75 from Pltf's. atty. requesting considera- tion of motion for stay
	29	" Stipulation re documents constituting record on appeal
	30	Original pertinent papers, docket entries and Clerk's certifi- cate mailed to Clerk, CCA (attorneys will retain exhibits until argument in CCA)

CLOSED *Appeal*

DC-111A (Rev. 1/75)

Transcript of Testimony of Annie Mae Crum.

1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF NEW YORK

3 *****

4 J. C. B. SUPER MARKETS, INC.,

5 Plaintiffs,

6 -v-

CIVIL ACTION
NO. 1970-232

7 UNITED STATES OF AMERICA and
8 UNITED STATES DEPARTMENT OF AGRICULTURE,

9 Defendants.

10 *****

11 Proceedings of trial held before the Hon. John
12 T. Curtin, United States District Judge, in Part II, United
13 States Court House, Buffalo, New York, commencing on July 30,
14 1973.

15 APPEARANCES: HODGSON, RUSS, ANDREWS, WOODS & GOODYEAR,
16 Attorneys for Plaintiff; GROVER A. JAMES,
17 JR., Esq., of Counsel.

18 JOHN T. ELFVIN, United States Attorney,
19 Attorney for Defendant; THEODORE BURNS,
20 Assistant United States Attorney, of
21 Counsel.
22
23
24
25

1 ANNIE MAE CRUM (909 Michigan Avenue, Buffalo,
2 New York), a witness called by and in behalf of the defendant,
3 having been first duly sworn, was examined and testified as
4 follows:

6 DIRECT EXAMINATION BY MR. BURNS:

7 Q Miss Crum, would you state your occupation, please?

8 A I am - -

9 THE COURT: It is very difficult to hear in this
10 courtroom. Would you move your chair
11 up. Move the microphone down so you can
12 speak directly into it.

13 THE WITNESS: I work at J. C. Brock, put carrots
14 in a bag.

15 BY MR. BURNS:

16 Q Miss Crum, by whom were you employed back in March of
17 1969?

18 A I was working with Manpower.

19 Q Did you ever have occasion to do any work for the United
20 States Department of Agriculture?

21 A Yes, I did.

22 Q What type of work did you do for them?

23 A Assist in, you know, to go to the stores to shop.

24 Q What was the purpose of these visits?

25 A ~~The purpose was to determine if they were selling~~

1 ineligible items for the coupons.

2 Q How long had you been doing this work prior to March of
3 1966, - I'm sorry, March of 1969.

4 A Oh, about two years.

5 Q And what instruction was given you when you first took
6 the job?

7 A To leave my purse in the car generally and never to have
8 money on my person, you know, in my pockets, and to make
9 the coupons obvious.

10 Q Did you go to these stores in the company of a special
11 agent?

12 A In the car, yes, but not in the store together.

13 Q And do you know approximately how many times you had
14 done this before March 25, 1969?

15 A Oh, several times.

16 Q Could you place a number?

17 A No. Offhand I can't.

18 Q Did you have occasion in March of 1969 to go to the
19 J.C.B. Super Markets doing business as Tops Market
20 at 409 Niagara Street in Buffalo?

21 A Yes.

22 Q And with whom did you go to that store?

23 A Mr. Goodman.

24 Q What happened when you arrived at that store? What
25 happened while you were in the car with Mr. Goodman?

- 1 A Oh, he would give me a list of items to purchase for
2 the food coupons and that was all, and then he would
3 tell me to go into the store.
- 4 Q Now, on that day, would he tell you what the mission was
5 or what the job was to be performed? Did he tell you
6 where you were going?
- 7 A Oh, yes, yes.
- 8 Q Did he tell you what he wanted you to do?
- 9 A Yes.
- 10 Q What did he tell you?
- 11 A Oh, he told me to purchase the items on the list, the
12 ineligible ones and the eligible ones.
- 13 Q Now, do you know what items are ineligible?
- 14 A Yes.
- 15 Q Generally, what do you consider ineligible?
- 16 A Cigarettes and oh, taxable items and items that aren't
17 food.
- 18 Q And other items that are not food?
- 19 A Yes.
- 20 Q Now, do you recall any specific instructions Mr. Goodman
21 gave you on your first visit to the store?
- 22 A No.
- 23 Q Did he tell you anything, - did he keep your purse?
- 24 A Well, I would just leave it on the seat in the car.
- 25 Q Did he give you any food stamps?

1 A Yes.

2 Q And what did he tell you to do?

3 A To purchase the items on the list from the store.

4 Q Did you then go into the store of J.C.B. Super Markets?

5 A Yes.

6 Q How long were you there?

7 MR. JAMES: Pardon me. I just wonder if we
8 could get the dates we are talking about.

9 BY MR. BURNS:

10 Q I beg your pardon. March 25, 1969 did you go into the
11 store?

12 A Yes.

13 Q What did you do while you were in the store?

14 A I take a cart and go around and pick out the items that
15 would be on the list.

16 Q Now, did you pick out food items as well?

17 A Yes.

18 Q And what would you do next after you finished loading
19 up your cart?

20 A Take it to a clerk.

21 Q Now, what would you do when you approached the clerk?

22 A Nothing special, but, except to try and let her see that
23 I had the coupons, you know.

24 Q How would you do that?

25 A I would hold them in my hand.

1 Q Would you hold it in a hand close to the checker?

2 A Yes.

3 Q Did you try to call attention to the fact you had
4 food coupons in your hand?

5 A No.

6 MR. JAMES: Just a minute, I object. This is
7 leading, your Honor.

8 THE COURT: Sustain the objection. It is leading.
9 Have the witness describe in her own
10 words what she did.

11 BY MR. BURNS:

12 Q What did you do with the coupons, Miss Crum?

13 A Hold them in my hand, you know, while shopping at the
14 counter and while waiting if I have to wait.

15 THE COURT: You mean you get up to the check-out
16 station. I suppose you put the items up
17 on the counter and then what occurred?

18 THE WITNESS: Nothing. I would have the coupons
19 in my hand, you know.

20 THE COURT: What did the clerk in the store do?

21 THE WITNESS: Checking out the items.

22 THE COURT: Go ahead.

23 BY MR. BURNS:

24 Q Now, did the checker ring up the items that you had
25 placed on the counter?

- 1 A Yes.
- 2 Q Were there some ineligible items on that counter?
- 3 A Yes.
- 4 Q Where were your food coupons at the time the checker was
- 5 ringing up these items?
- 6 A In my hand.
- 7 Q How far were you standing from the checker, would you
- 8 estimate?
- 9 A Well, the normal distance, you know. No special way.
- 10 Q Where were your hands placed?
- 11 A Well, generally, you know, like you are waiting, you
- 12 know, in front of you.
- 13 Q Now, Miss Crum, I hand you Government Exhibit Number 12
- 14 for identification and ask you if you can identify that
- 15 exhibit?
- 16 A Yes.
- 17 Q Is your signature on that document?
- 18 A Yes, it is.
- 19 Q Where is it? Where can it be found?
- 20 A At the bottom of the sheet.
- 21 Q On Page 1?
- 22 A Yes.
- 23 Q And is it anyplace else in the document?
- 24 A At the bottom of, - on the line on the second sheet.
- 25 Q Now, do you know how this document was prepared?

- 1 A Yes, I do.
- 2 Q Would you explain how it was prepared?
- 3 A Well, after going in the store and coming out, I take the
4 food items and what was purchased to the car where the
5 agent is and then we either drive a couple of blocks
6 or some distance shortly afterwards, you know, and write
7 it up.
- 8 Q And who would write up this document?
- 9 A Mr. Goodman.
- 10 Q Would he ask you questions before writing it up?
- 11 A Yes. Well, sometimes, yes.
- 12 Q And can you identify the items that are listed on here
13 on the bottom of Page one of the document and the top of
14 Page two?
- 15 A Yes.
- 16 Q What are those items?
- 17 A One package Tops paper - -
- 18 Q No, I mean what is it, a list. It is obviously a list.
19 What is it a list of?
- 20 A Oh, items purchased.
- 21 Q Now, Miss Crum, when you were in the store at the check-
22 out counter, what items were on that check-out counter,
23 what items were you attempting to purchase?
- 24 A Oh, beer, and a package of paper napkins and a package
25 of Tops paper towels, Vim Detergent Tablets.

- 1 Q Are these items listed, the items that you attempted to
2 purchase, are they listed on the exhibit?
- 3 A Yes, they are.
- 4 Q Were there other items you attempted to purchase that
5 day?
- 6 A No. Oh, cigarettes, perhaps.
- 7 Q Had you laid any cigarettes down on the counter in front
8 of the cashier?
- 9 A No. You have to get them someplace else in the store.
- 10 Q Now, as you are going through the line, through the
11 check-out line, did the checker start ringing up these
12 items?
- 13 A Yes.
- 14 Q What were you doing when she was ringing up the items?
- 15 A Waiting.
- 16 Q Did she ask you any questions about any one of these
17 thirteen items listed in Government Exhibit 13 for
18 identification?
- 19 A No, she didn't.
- 20 Q Did she, after ringing up all these items, present you
21 with a bill?
- 22 A Yes, and the amount that it was.
- 23 Q Did she present you with a cash register tape or a figure
24 or did she tell you how much you owed?
- 25 A She tell me how much it was.

- 1 Q After she told you how much you owed, what did you then
2 do?
3 A Gave her the coupon book.
4 Q And what coupons were these?
5 A The ones that Mr. Goodman handed me.
6 Q What did the checker do at this point?
7 A She would take them out, take the amount, you know, of
8 the coupons out to cover the bill.
9 Q Did she say anything to you when you presented the coupons
10 to her?
11 A No.
12 Q At the point when you presented the coupons to her, where
13 were these thirteen items?
14 A In the bag.
15 Q They were in a bag?
16 A Generally, or she was getting ready to put them in a
17 bag.
18 Q Were they on the counter or were they in a bag?
19 A Normally, they get paid, they take the pay and then they
20 put them in the bag.
21 Q Now, after you handed the coupons to the checker, what
22 did she do?
23 A She took out the number she needed to cover the amount of
24 the bill and then she gave me back, you know, would give
25 me back change and a due bill.

- 1 Q Now, did she say anything to you about the items that
2 you were purchasing?
- 3 A Not that day.
- 4 Q Did she say anything at all to you that you can recall
5 regarding these purchases?
- 6 A No, not that day.
- 7 Q Did you have any money on your person when you were in
8 that store?
- 9 A No.
- 10 Q After you departed from the store, where did you go?
- 11 A To the car, back to the car where Mr. Goodman was.
- 12 Q Did you stop anywhere along the way?
- 13 A No.
- 14 Q Did you take anything out of the bag?
- 15 A No.
- 16 Q Did you put anything in the bag?
- 17 A No.
- 18 Q And what happened when you got back to the car Mr.
19 Goodman's car?
- 20 A I put the bag in the, - on the seat and I would tell him
21 what happened, if anything had been said or if I had
22 received any, - well, if I had purchased any ineligible
23 items.
- 24 Q When you returned to the car, were these items taken
25 out of the bag in which you had been carrying them?

1 MR. JAMES: Now, pardon me. I am going to object
2 to the leading, your Honor.

3 THE COURT: I will sustain the objection. Let
4 the witness tell what she did.

5 BY MR. BURNS:

6 Q All right. Miss Crum, when you returned to the car, can
7 you tell us in as much detail as you can recall what you
8 did, what you said to Mr. Goodman and what he said to you?

9 A Well, when I immediately returned to the car, like I
10 said - -

11 MR. JAMES: Pardon me. I am going to object to
12 the conversation.

13 THE COURT: Conversation, I will sustain the
14 objection to conversation. You can tell
15 us what you did.

16 THE WITNESS: What I did?

17 THE COURT: Yes, what you did.

18 THE WITNESS: Oh, well, I walked to the car and
19 put the bag in the car and that's when I
20 said - -

21 THE COURT: You cannot tell us what you said.
22 You took the items out of the bag, all
23 right.

24 THE WITNESS: No. We would drive a couple of
25 blocks or so.

1 THE COURT: All right. You tell us what you did,
2 but under the rules, I cannot listen to
3 conversations between you and Mr. Goodman.
4 You can do that, you can tell us all the
5 things you did with the items. Just do
6 not tell us what was said.

7 THE WITNESS: Okay. Well, I took, came out of the
8 market and took the bag to the car and got
9 in the car and put the bag on the seat,
10 whether it would be the front seat or
11 sometimes it was the back seat, and that
12 was all, and then I got back in the car
13 and we would drive away from this market.

14 BY MR. CRUM:

15 Q After you had driven away from the market, would you,
16 then what would happen?

17 A Then Mr. Goodman would write up what had occurred, my
18 name. I mean, you know, put my name on the first line.

19 THE COURT: Miss Crum, you have to keep your
20 voice up, please.

21 THE WITNESS: By putting my name, you know,
22 identify me as having been in the store
23 to make the purchases and then the
24 identity as close as possible of the
25 clerk.

1 BY MR. BURNS:

2 Q Did either one of you at any occasion look at the items
3 in the bag?

4 A Yes. Then we would go through the bag and write up what
5 was purchased.

6 Q Now, and what is this, on Government Exhibit 12 for
7 identification, what is this list of thirteen items,
8 eleven items, I beg your pardon.

9 A Oh, these are the items I purchased from the market that
10 day.

11 Q Who made this list?

12 A Mr. Goodman.

13 Q Now, you stated your signature appears at the bottom of
14 Page 1 of this exhibit and on the line - -

15 A On the second sheet.

16 Q On Page 2 of this exhibit. Did you sign this statement?

17 A Yes, I did.

18 Q Did you read the statement before it was signed?

19 A Yes, I did.

20 Q And when was it signed?

21 A The same day, March 25th.

22 Q Now, you stated that you had been working as a shopper
23 or investigative aide for the Department of Agriculture
24 for a couple of years prior to this incident?

25 A Yes.

1 Q Was this a normal procedure that you would use after
2 shopping?

3 A Yes.

4 MR. JAMES: Wait a minute. I object to that,
5 your Honor.

6 THE COURT: Normal procedure, I will sustain
7 the objection.

8 BY MR. BURNS:

9 Q Now, Miss Crum, are these documents prepared in the
10 normal course of the business of a shopper or investiga-
11 tive aide?

12 A Yes.

13 Q And is it the regular business after one of these
14 shoppings to prepare one of these documents?

15 A Yes.

16 THE COURT: Mr. Burns, let us not go through
17 a lot of folderol here. It is not going
18 to go in. This is not kept in the regular
19 course of business, period. It is an
20 investigative report. Now, if you want
21 to offer it because the witness, --
22 if she cannot describe what the clerk
23 looked like, she cannot recall at this
24 time, that is understandable, but if it
25 was accurately made at the time and she

1 can tell us that this is what the lady
2 looked like, then I will admit it under
3 that rule. I mean I do not like to be
4 stuffy about it, but if we are going to
5 go ahead, let us do it in what I believe
6 is the correct manner.

7 BY MR. BURNS:

8 Q Miss Crum, was this document prepared, - well, how soon
9 after your visit to the store was Government Exhibit
10 Number 12 prepared?

11 A Well, at least ten to twenty minutes after leaving the
12 store.

13 Q Does it represent an accurate description of the events
14 that took place.

15 A Yes, as close, - yes, as accurately as possible.

16 Q All right. Now, did you have occasion to go back to the
17 store on another date?

18 A Yes.

19 Q Do you recall the date?

20 A The next day.

21 Q Which would be March what?

22 A 26th.

23 Q All right. How did you go to the store?

24 A In a car with Mr. Goodman.

25 Q Did Mr. Goodman give you any instruction prior to your

- 1 entering the store?
- 2
- 3 A Except what I was to buy again.
- 4 Q Did he give you any coupons?
- 5 A Yes, coupons.
- 6 Q Did he make any request about your purse?
- 7 A Well, to leave it in the car, I should leave it in the
- 8 car.
- 9 Q What else can you recall that he told you that day before
- 10 you entered the store?
- 11 A Nothing special, more than what he generally would say.
- 12 Q And did he give you any instruction about what he wanted
- 13 you to do in the store?
- 14 A Which clerk to go to. I mean, like he would say go to
- 15 the same one as you went to yesterday or go to a different
- 16 one.
- 17 Q Do you recall, - well, I hand you Government Exhibit
- 18 13 for identification. Can you identify that document?
- 19 A Yes.
- 20 Q What is that?
- 21 A This is the next day work at the store.
- 22 Q Now, did Mr., - Do you recall if Mr. Goodman gave you
- 23 any particular instructions prior to entering the store
- 24 on March 26?
- 25 A No, no special instructions.
- Q Do you know if he told you to see a certain checker or

1 the same checker or a different checker?

2 A. Yes, the same one.

3 Q. Do you know if he told you to go to the same one or were
4 you supposed to go to a different one?

5 A. No. He told me to go to the same one.

6 Q. Did he give you any food stamps?

7 A. Yes.

8 Q. And what did you do after he gave you the food stamps
9 and the instructions?

10 A. Well, I put them in my hand and went to the store, into
11 the market and there I purchased these items that were
12 on the list for that day.

13 Q. Approximately how long were you at the store?

14 A. Oh, about fifteen or twenty minutes.

15 Q. Did you have any cash on your person?

16 A. No.

17 Q. What items did you gather during your shopping visit
18 to the store on the 26th?

19 A. Well, a six pack of Yacht Club Beer and a box of Dash
20 Detergent and Imperial Scraper, a cake of Dial Soap
21 and a box of moth balls, a package of shoe laces and
22 some Scott Tissue and a can of Campbell's soup, a package
23 of Oscar Meyer Salsami, a jar of Gulden's Mustard, a
24 quart of milk and a box of Quaker Cereal and a loaf
25 of Dairy Rich Bread.

Q. Now, are any of these items on this list ineligible

1 items?
2 A. Yes, they are.
3 Q. Which items are those?
4 A. The beer, the detergent, the scraper, the soap, the moth
5 balls, the shoe laces and the Scott Tissue.
6 Q. Now, how did you present these items to the checker on
7 your way out of the store?
8 A. Well, I had them in the cart and I just pulled the cart
9 up to the counter and with the food stamps obvious.
10 Q. Where were the food stamps, do you recall?
11 A. In my hand.
12 Q. How far were you from the checker?
13 A. Right in front of her.
14 Q. Approximately what distance, could you estimate?
15 A. Oh, maybe about a foot in front of her.
16 Q. And where would the food stamps be?
17 A. In my hand, obvious.
18 Q. Would they be within her line of sight?
19 A. Yes.
20 MR. JAMES: Wait.
21 THE WITNESS: Yes.
22 MR. JAMES: Wait, please wait until I object.
23 THE COURT: Sustain the objection.
24 MR. JAMES: If the witness please wouldn't
25 answer when it looks like I am going to

1 object until I have a chance to object.

2 THE COURT: Please do not lead, Mr. Burns.

3 Just have the witness tell us what she
4 did and so forth.

5 BY MR. BURNS:

6 Q What happened, Miss Crum, after you put the items listed
7 here on the check-out counter?

8 A Well, she added them up and told me how much I owed her
9 and then she took out the number of coupons needed again
10 and gave me change and a due bill.

11 Q Did she say anything to you regarding the items you were
12 purchasing?

13 A Yes. This day, the next day, she says she is not
14 supposed to let me have those items, meaning the beer and
15 the detergent, the ineligible items, but she would let
16 me have them that day.

17 Q Did you ask her especially, - did you make some request
18 of her to give them to you?

19 A No, no.

20 Q What response did you make after she said or did you make
21 any response to her after she said you are not normally
22 allowed to have them?

23 A No.

24 Q What did she do after she said this to you?

25 A She gave them to me.

- 1 Q And what happened with the food stamps?
- 2 A Well, she gave me the book. I always put the book in the
- 3 bag and she put the due bill and stuff, I assumed she had
- 4 put it in the bag.
- 5 Q Then what did you do after she had the stamps?
- 6 A I went out of the store and went back to the car.
- 7 Q Did you stop anyplace after leaving the store and before
- 8 arriving at the car?
- 9 A No.
- 10 Q How close is the car to the super market?
- 11 A It may have been, let's see, he could have been in the
- 12 lot or down the street a block away.
- 13 Q And what happened once you got back to the car?
- 14 A Oh, I put the bag in the car and like I say, if I was
- 15 sitting in the back seat or the front seat of the car
- 16 and I would get in the car.
- 17 Q Then what happened?
- 18 A That's all.
- 19 Q Would you stay at that location?
- 20 A No. We would drive away.
- 21 Q And then what next happened between you and Mr. Goodman?
- 22 A Then we would write up what had been purchased, what
- 23 had happened.
- 24 Q Did you ever, - did either one of you ever look into the
- 25 bag?

- 1 A Yes.
- 2 Q Well, describe what happened, what you would do, what you
3 did?
- 4 A Oh, well, we would glance in the bag, you know, and - -
- 5 Q Well, how was this list prepared in Government Exhibit
6 13 for identification?
- 7 A How was it prepared?
- 8 Q That's right.
- 9 A He would prepare it.
- 10 Q Well, how would he go about describing these items?
- 11 A Well, he would write them down and tell me, you know,
12 this is what to buy.
- 13 Q I am talking about when you are back in the car.
- 14 A Oh.
- 15 Q You say Mr. Goodman made this list?
- 16 A Right.
- 17 Q How did he make this list?
- 18 A Oh, by taking the items out of the bag and writing them
19 down by identity.
- 20 Q Now, Miss Crum, do you see your signature or have you
21 signed this document, Government Exhibit 13?
- 22 A Yes.
- 23 Q Did you read this document before you signed it?
- 24 A Yes, I did.
- 25 Q Is it an accurate representation of what transpired that

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day?

A. Yes.

Q. Now, did you have another occasion to go to J.C.B.
Super Markets?

A. Yes, I did.

THE COURT:

Before we get to the next day, we
will take a recess.

(A short recess.)

1 PROCEEDINGS: After short recess.

2 APPEARANCES: As before noted.

3
4 ANNIE MAE CRUM, a Witness called by and in behalf
5 of the Defendant, having been previously duly sworn, resumed
6 the witness stand and testified further as follows:

7
8 DIRECT EXAMINATION BY MR. BURNS: (Resumed)

9 Q. Now, Miss Crum, I believe we just finished up with your
10 telling the Court of your visit to these J. C. B. Super
11 Market on March 26, 1969. Now, did there come a third
12 occasion when you visited the store?

13 A. Yes.

14 Q. What was that day?

15 A. March 27th.

16 Q. Now, would you describe the circumstances surrounding
17 your visit to the store that day?

18 A. Well, we went a little earlier and --

19 Q. Did you meet Mr. Goodman someplace?

20 A. Yes. He picked me up near my house.

21 Q. Go ahead, proceed.

22 A. And we drove to the market again and I made a few
23 purchases shown for that day.

24 Q. Now, did you approach the store in his car?

25 A. Yes.

2

1 Q. Did he give you any instructions before you arrived at
2 the store?

3 A. Go to another clerk.

4 Q. Did he tell you he wanted you to shop the store once
5 again to try to purchase different items?

6 A. Yes, go to a different clerk.

7 Q. Did he tell you what items he wanted you to purchase?

8 A. Yes, generally the same idea.

9 Q. What else did you do before you went in the store?

10 A. Nothing else.

11 Q. Did he give you anything?

12 A. The coupons.

13 Q. Did he take anything from you?

14 A. No, I left my purse in the car.

15 Q. Did you have any cash or any cash on your person when you
16 entered the store?

17 A. No.

18 Q. What did you do once you were in the store?

19 A. I got a shopping cart and went around to get the items
20 for that day.

21 Q. Now, I hand you Government Exhibit 14 for identification
22 and ask you if you can identify that exhibit?

23 A. Yes.

24 Q. What is that exhibit?

25 A. Six ineligibles and six eligible items.

3

1 Q. No. What is this document?

2 A. Oh, this document is a statement from, with what do you
3 call it, what occurred that day.

4 Q. Is this statement signed by you?

5 A. Yes, it is.

6 Q. At what place?

7 A. At what places?

8 Q. Where is it signed?

9 A. Oh, at the bottom of the first sheet and on the line
10 on the second sheet.

11 Q. Now, is there a list of items included on this exhibit?

12 A. Yes.

13 Q. What are those items?

14 A. These are the items. Do you want me to name --

15 Q. No. What are they, where do they come from?

16 A. Oh, they was bought from this market.

17 Q. Were these the items that you had picked up in the
18 market?

19 A. Yes.

20 Q. Now, what did you do with these items before leaving the
21 market, after you put them in the cart?

22 A. Oh, after I put them in the cart I went to another
23 checker, another clerk, and this time it was a man and he
24 checked them for me.

25 Q. Now, what did you do with these items?

4

1 A. Oh, after he put them in the bag --

2 Q. No, let's back up a minute. After you put these items
3 in your cart and before you left the store, did you go
4 to the checkout counter?

5 A. Yes.

6 Q. And what did you do with the items when you arrived at
7 the checkout counter?

8 A. Oh, I put them on the counter.

9 Q. What items did you put on the counter?

10 A. The paper towels, the knife, Palmolive Soap, a GE light
11 bulb and a box of Vim Detergent tablets, a dishcloth,
12 a box of Salerno Saltines, a package of rolls, a can of
13 Campbell's Soup, a box of Cheerios, a bottle of Hunt's
14 Catsup and a bottle of Home Orange Drink.

15 Q. Now, in this list of twelve items, were there any that
16 were ineligible items?

17 A. Yes. The first six, the paper towels, the knife, the
18 soap, the light bulb, the detergent tablets and the
19 dust cloth.

20 Q. Did you have any food stamps in your possession at that
21 time?

22 A. Yes, I did.

23 Q. Will you proceed to tell the Court how you approached the
24 checkout counter, what you did with your hands and with
25 the coupons and with the items that are listed here?

5

1 A. Well, I pushed the cart up to the counter, up to the
2 place of checkout and the male clerk checked the articles
3 out and I had the food coupons obvious in my hand and
4 he run them up on the cash register and then I paid for
5 them. He asked for the coupons and he took off the
6 amount needed to cover, and that was what happened.

7 Q. Now, do you know if he asked for the coupons before he
8 had put them in the bag or after he put them in the bag?

9 A. He asked for them before.

10 Q. Did he make any comment to you about the items you were
11 attempting to purchase?

12 A. No.

13 Q. Did he mention that any of these items were ineligible
14 items?

15 A. No.

16 Q. Did he give you any change from this transaction?

17 A. Yes, he did.

18 Q. What did he give you?

19 A. Thirteen cents. Oh, a due bill for thirteen cents, I
20 am sorry.

21 Q. And what did you do with these items when you left the
22 store?

23 A. I took them to the car where Mr. Goodman was waiting
24 and I put them on the front seat or in the back seat,
25 as normally I do, and then we drove away.

6

1 Q. Did you then stop someplace and review what had happened?

2 A. Yes.

3 Q. What did the two of you do?

4 A. Mr. Goodman wrote up this list, this form here.

5 Q. Did you sign this form?

6 A. Yes, I did.

7 Q. Did you read this form before you signed it?

8 A. Yes, I did.

9 Q. Does it represent accurately what transpired that
10 day?

11 A. Yes, it does.

12 MR. BURNS: I have no further questions.

13 THE COURT: All right.

14 BY MR. BURNS:

15 Q. I beg your pardon. Miss Crum, after the visit of
16 March 27th, did you have occasion to go back to J. C. B.
17 Super Market on any other occasion?

18 A. Yes.

19 Q. Do you recall when?

20 A. In April.

21 Q. Do you recall what the dates were?

22 A. The 4th, in that week.

23 Q. How many visits were there?

24 A. Three.

25 Q. And what were the purposes of those visits?

1 A. One was to see if they would purchase food coupons for
2 cash.

3 Q. Did you follow a procedure any different from the one
4 that you have already related?

5 MR. JAMES: Pardon me.

6 THE WITNESS: No.

7 MR. JAMES: Pardon me. I object to that, your
8 Honor.

9 THE COURT: I sustain the objection.

10 BY MR. BURNS:

11 Q. Miss Crum, you said you returned to the store on three
12 occasions. Would you describe to the Court what you did
13 on these three occasions?

14 THE COURT: I suppose we can only do it one by
15 one. What happened on the first occasion?

16 THE WITNESS: Well, the first time I went into the
17 store --

18 THE COURT: About how much after was this from
19 the time of the last visit which, as I
20 understand, was March 28th?

21 THE WITNESS: About a week.

22 THE COURT: About a week, all right.

23 THE WITNESS: I went into the store and attempted
24 to sell coupons for cash.

25 BY MR. BURNS:

- 8
- 1 Q. And what was the, - what did the checkout --
- 2 A. No, she said no.
- 3 Q. Did you return to the store on another occasion?
- 4 A. Yes.
- 5 Q. Do you recall approximately when?
- 6 A. The 9th, I think.
- 7 Q. Just an approximation.
- 8 A. Within the same week.
- 9 Q. What did you attempt to do on that occasion?
- 10 A. I have to look and see.
- 11 Q. Well, did you return to the super market together with
- 12 Mr. Goodman?
- 13 A. Yes.
- 14 Q. What was the, - do you recall the general purpose of
- 15 why you were back in the store?
- 16 A. Well, with the coupons. I think that was in that week,
- 17 to sell coupons.
- 18 Q. And during that, - and then did you enter the store with
- 19 your coupons?
- 20 A. Yes, yes.
- 21 Q. Did you attempt to make a transaction with these
- 22 coupons?
- 23 A. Yes. I asked her and she said "No".
- 24 THE COURT: That does not mean anything. What
- 25 did you do with the coupons? Did you try

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1

to make a transaction with the coupons?

2

I do not know what you mean by that.

3

THE WITNESS: Coupons for cash, to exchange them for money.

4

5

THE COURT: You asked her to exchange them. Did you go and bring any items to the checkout counter on that day?

6

7

8

THE WITNESS: No.

9

THE COURT: And she said "No"?

10

THE WITNESS: Yes.

11

THE COURT: Go ahead, Mr. Burns.

12

BY MR. BURNS:

13

Q. Now, did you return to the store on another occasion?

14

A. Yes.

15

Q. Do you recall approximately when that would be?

16

A. Let me see, either the 4th or the 8th.

17

THE COURT: You are looking at something. Is this your memorandum?

18

19

THE WITNESS: No, it wasn't.

20

THE COURT: You are looking at something.

21

BY MR. BURNS:

22

Q. I beg your pardon. You did not return the sixth time?

23

A. No.

24

THE COURT: You are looking at some paper there. Is that your memorandum?

25

- 1 THE WITNESS: I got it from Mr. Burns.
- 2 THE COURT: That is not right, Mr. Burns. She
3 shouldn't be using that.
- 4 MR. BURNS: No. I am not encouraging her to do
5 that at all. In fact, I didn't ask her
6 to.
- 7 THE COURT: Then have her put it down then. If
8 she made it, it would be different.
- 9 BY MR. BURNS:
- 10 Q. Did you have any occasion to visit the store after your
11 fifth visit?
- 12 A. No.
- 13 MR. BURNS: I have no further questions.
- 14
- 15 CROSS EXAMINATION BY MR. JAMES:
- 16 Q. Miss Crum, in 1969 when you did these three shoppings
17 were you unemployed?
- 18 A. Well, not actually.
- 19 Q. You were working with Manpower?
- 20 A. Yes.
- 21 Q. Were you on Welfare at the time?
- 22 A. I am trying to recall. I don't think so.
- 23 Q. Do you recall how Mr. Goodman first got in contact with
24 you?
- 25 A. Yes, through New York State Employment.

11

- 1 Q. New York State Employment?
- 2 A. Yes.
- 3 Q. Were you on Welfare at that time, or unemployed?
- 4 A. Yes, I had been laid off.
- 5 Q. Okay, I see. Now, before you made the shoppings in
- 6 March of 1969 did you know Betty Gainer?
- 7 A. No. I don't know her today.
- 8 Q. You never did know Betty Gainer?
- 9 A. No, I never knew her.
- 10 Q. And you couldn't put a name to a face today, could you?
- 11 A. No, I couldn't. I only know her name from here, from
- 12 the case.
- 13 Q. All right, and where did you first hear her name in
- 14 connection with this case?
- 15 A. I read her name.
- 16 Q. Where did you read her name?
- 17 A. From the Federal, - from Mr. Burns, but I didn't know
- 18 her name before.
- 19 Q. I see, and you don't really know whether she has any
- 20 personal connection with these transactions or not, do
- 21 you?
- 22 A. Personal?
- 23 Q. Personally you don't know yourself, do you?
- 24 A. I don't know what you mean.
- 25 Q. I say you don't know whether Betty Gainer is the one that

- 1 you bought these things from her.
- 2 A. Oh, I know she had a colored woman.
- 3 THE COURT: You did not know her name?
- 4 THE WITNESS: No, I didn't know her name.
- 5 THE COURT: The only way you know her name now
- 6 is that Mr. Burns or someone else told
- 7 you that was her name?
- 8 THE WITNESS: Right. I saw it or I heard it.
- 9 THE COURT: All right.
- 10 BY MR. JAMES:
- 11 Q. Now, on these, - may I have those affidavits or state-
- 12 ments, please --
- 13 MR. BURNS: She may still have them.
- 14 MR. JAMES: Do you have those three statements?
- 15 MR. BURNS: Yes.
- 16 BY MR. JAMES:
- 17 Q. Okay. On these statements, on the one from March 25th
- 18 I notice, - oh, it is not there. On the statement from
- 19 March 25th, this is the copy that the Government gave
- 20 me in the answers to interrogatories, the name of
- 21 Betty Garner, Stark, is written on the first page there.
- 22 Did you write that name in there?
- 23 A. No, I didn't.
- 24 Was that name written in there when you signed the
- 25 statement on March 25th?

- 1 A. No.
- 2 Q. All right, and then on March 26th in the copy of the
3 statement fastened to my interrogatories, someone wrote
4 in the name Betty Gainer. Was that written in there
5 when you signed this statement? ✓
- 6 A. No, it wasn't.
- 7 Q. And do you know who wrote that in there?
- 8 A. No, I don't.
- 9 Q. And then on Page, - on the one from March 27th, that is
10 your shopping, in the one that is fastened to my answer
11 to interrogatories, someone wrote in the name John Cusack,
12 clerk, and then crossed out the word clerk and wrote in
13 the word manager. Was that on there when you signed
14 your statement on March 27, 1969? ✓
- 15 A. No, it was not. ✓
- 16 Q. And that is not in your handwriting, is it?
- 17 A. No, it is not.
- 18 Q. And neither is the name of Betty Gainer?
- 19 A. No.
- 20 Q. And you have no idea who put those names there? ✓
- 21 A. No, I don't.
- 22 Q. Okay. Now, the first time that you did your shopping,
23 the one on March 25th, did Mr. Goodman tell you who
24 to go to?
- 25 A. No.

- 1 Q. Are you sure or don't you remember?
- 2 A. I am trying to recall. No, he did not.
- 3 Q. He didn't, okay. Now, you were describing what you did
- 4 when you went up to this clerk and you said well, I had
- 5 these food stamps and they were obvious or something
- 6 like that, is that right?
- 7 A. Yes. I didn't say anything. I just had them in my
- 8 hand.
- 9 Q. When you walked up to the clerk, to the cashier, would
- 10 she be on your left or on your right?
- 11 A. Well, on my, - I think they are on my left.
- 12 Q. On your left?
- 13 A. Yes.
- 14 Q. And is there a counter up along there where you can
- 15 put your food?
- 16 A. Yes.
- 17 Q. And then the cashier sits behind the counter, does she?
- 18 A. Yes.
- 19 Q. And she is working away at her machine, is she?
- 20 A. Yes.
- 21 Q. And she is taking care of the customer ahead of you,
- 22 is she?
- 23 A. If there are people ahead, yes.
- 24 Q. And then when it is your turn, you are taking your stuff
- 25 out of your cart, are you, and putting it onto the

15

1 counter?

2 A. Yes.

3 Q. All right. Now, when you were taking the stuff out of
4 your cart and putting it on the counter, where were your
5 coupons?

6 A. In my hand.

7 Q. In your hand?

8 A. Yes.

9 Q. I see. You didn't have a purse with you at that time?

10 A. No.

11 Q. What were you wearing?

12 A. A coat, a black coat one day and a fur-trimmed coat
13 maybe the next day.

14 Q. And did it have pockets with it?

15 A. Yes.

16 Q. And you didn't have the coupons in there while you were
17 unloading this?

18 A. No.

19 Q. I see. Okay. Then you have the food up there and then
20 she what, immediately starts the sorting of the food and
21 hitting the keys, is that the way it works?

22 A. Yes.

23 Q. Now, were you standing up like this waving those at her?

24 A. No, no, just normal.

25 Q. Your hand was down at your side?

- 16
- 1 A. Yes.
- 2 Q. Maybe she saw it and maybe she didn't?
- 3 A. No. I see that they see it because they tell you to
- 4 hold them so the cashier can see them.
- 5 Q. Now, these food stamps, how big are they, the book?
- 6 A. About this big, the size of a bill.
- 7 Q. The size of a what?
- 8 A. A bill, a dollar bill.
- 9 Q. About as big as a dollar bill, are they?
- 10 A. Yes.
- 11 Q. Okay.
- 12 A. Maybe just a little longer.
- 13 Q. Now, on these three transactions did you get cash register
- 14 receipts?
- 15 A. Yes. I left it up to them. They put it in the bag.
- 16 Q. I see, and then those cash register receipts if you got
- 17 them would go in the bag, is that right?
- 18 A. Yes.
- 19 Q. And then when you got back to the car with Mr. Goodman,
- 20 what, you dumped the bag out?
- 21 A. Yes.
- 22 Q. Or did you pull the items out?
- 23 A. Yes, I would pull the items out.
- 24 Q. What would you do with the cash register receipt that
- 25 was in the bag?

- 1 A. Oh, Mr. Goodman would take the cash register receipt.
- 2 Q. And you would see him take them with him, would you?
- 3 A. Yes.
- 4 Q. All right, and what about the due bills, would he also
- 5 take them?
- 6 A. If they put them in the bag, then we would have them and
- 7 he would take them and be able to write them down.
- 8 Q. Would you take those or would he take them with him?
- 9 A. Oh, yes, he would take them with him.
- 10 Q. And you wouldn't pay any attention to them yourself, is
- 11 that right?
- 12 A. No more than they were the correct cost.
- 13 Q. All right. I think you said on the occasion of your
- 14 second visit there, which would be March 26, 1969,
- 15 Mr. Goodman suggested that you go back to the same
- 16 clerk that you had bought the day before, is that right?
- 17 A. Yes.
- 18 Q. The same clerk that you say sold you items improperly?
- 19 A. Yes.
- 20 Q. Now, was that his custom and practice that if you found
- 21 a clerk that would sell you something improperly, that
- 22 then you would return to the same clerk the next day?
- 23 A. Yes, if there would be a next day, if there would be a
- 24 second day.
- 25 Q. I see.

18

1 A. Perhaps I mean I don't know if there is a rule or what,
2 but I know in some cases they will tell you to go to the
3 same clerk.

4 Q. All right, and I think you said that when you went back
5 to her the second day after your transaction was almost
6 through and you gave her the food stamps and then she
7 said that she was not supposed to let you have the
8 ineligible items, but that she would let you have them
9 anyway.

10 A. Yes, the second day.

11 Q. That is quoting you fairly?

12 A. Yes, that's true.

13 Q. So she was telling you that in accordance with the
14 instructions given her by the store, she was not allowed
15 to sell you that merchandise for food stamps, is that
16 right?

17 MR. BURNS: Your Honor, I object to the content
18 of that question.

19 THE COURT: I will permit it. Overruled.

20 BY MR. JAMES:

21 Q. Isn't that right?

22 A. Pardon?

23 Q. Isn't that right?

24 A. I didn't understand.

25 Q. She was telling you in effect that she had been instructed

- 1 by her management not to sell that kind of item for food
2 stamps but that she was going to do it anyway? ✓
- 3 A. Yes, the second day, but she sold them the first day.
- 4 Q. She didn't tell you that the first day?
- 5 A. No.
- 6 Q. All right, but the reason you went back to her the
7 second day was because she had sold the ineligible items
8 the first day, wasn't it?
- 9 A. I assume so. I don't know.
- 10 Q. Do you have those statements? When you wrote this
11 transaction up on your report that you signed for
12 Mr. Goodman, on March 26, you put it a little differently,
13 didn't you? Didn't you then say "I was not allowed to
14 have any taxable items for food stamps, but she would
15 let me have it this time", right? ✓
- 16 A. Excuse me, yes.
- 17 Q. So it was both those things, really in substance with
18 what she was telling you, is that right?
- 19 A. Yes.
- 20 Q. Although she knew it was improper and she had been told
21 not to do it, she was going to go ahead and do it for
22 you, is that right? ✓
- 23 A. Yes.
- 24 Q. Did she tell you that the management of the store had
25 instructed her that she could not give you those items?

- 1 A. No, she didn't say if anyone had said to her not to.
- 2 Q. She didn't go into that much detail?
- 3 A. No.
- 4 Q. Okay. Now, the third shopping, the one on March 27, 1969,
- 5 Mr. Goodman told you to go to a different --
- 6 A. Right.
- 7 Q. Cashier, is that right?
- 8 A. Yes.
- 9 Q. Now, do you know why that was? Was that a policy or did
- 10 he say why?
- 11 A. No. He just told me to go to a different one and I did.
- 12 Q. All right. Now, this one that you went to, did you
- 13 know this one ahead of time?
- 14 A. No, I didn't.
- 15 Q. Did you know who he was?
- 16 A. No, I didn't.
- 17 Q. Do you know today who he was?
- 18 A. No, I don't.
- 19 Q. All right, and do you know whether he had a position as
- 20 a cashier or as a manager or assistant manager, anything
- 21 like that?
- 22 A. No, I just thought he was a clerk.
- 23 Q. He was just another man standing in front of that cash
- 24 register tape marking things up, is that right?
- 25 A. Yes.

1 Q. Now, I think you said that he didn't tell you that any
2 of the items was ineligible, is that right?

3 A. No.

4 Q. Is that right?

5 A. Yes, he didn't say, but he just rung them up.

6 Q. Okay. Well, you did say something in connection with
7 cigarettes on your dealings with him, didn't you?

8 A. Oh, he refused to sell me cigarettes.

9 Q. He refused to sell you cigarettes?

10 A. Yes.

11 Q. And that is how you wrote it up. You said "I had also
12 selected cigarettes which the checker refused to sell
13 me for payment with food coupons", is that right?

14 A. Yes.

15 Q. Did he tell you why he refused to sell you the cigarettes
16 for food stamps?

17 A. No, he did not.

18 Q. He just said he couldn't do it?

19 A. Yes.

20 Q. Did he say it was against the food stamp regulations?

21 A. No. He just refused.

22 Q. Just refused?

23 A. Yes.

24 Q. But it was an out and out refusal and he wouldn't take
25 any argument on it?

22

1 A. Right.

2 Q. Okay. Now, after these first three shoppings, you then
3 went back a couple more times and the first time you
4 went back did you go back to see Betty Gainer that time?

5 A. Which time?

6 Q. This was after the first three shoppings.

7 A. Oh.

8 Q. Then on the fourth shopping did you go back to see
9 Betty Gainer again?

10 A. Not necessarily.

11 Q. Well, do you recall?

12 A. Well, I went in to exchange food stamps for cash.

13 Q. Yes, and do you remember who you went to see at that
14 time?

15 A. It was one of the clerks. I don't recall which clerk
16 it was.

17 Q. You don't remember on either occasion?

18 A. No. I really don't recall.

19 Q. Okay, and in any event, whoever you went to see, the
20 girl said no, she couldn't give you cash for food stamps?

21 A. Right.

22 Q. All right, and then the second time you think it was in
23 the same week you conducted a shopping there?

24 A. Four days later.

25 Q. And then you tried to buy ineligible items and the

- 1 clerk again said "No", is that right?
- 2 A. She refused.
- 3 Q. And did she say why she was refusing?
- 4 A. No.
- 5 Q. Do you have any recollection on it?
- 6 A. Yes. No one said why. They just refused.
- 7 Q. They just said "We can't do that", is that right?
- 8 A. Yes.
- 9 Q. Now, do you remember some, oh, a couple of years after
- 10 all these events took place the Government moved for
- 11 summary judgment and you signed a series of affidavits;
- 12 do you remember doing that?
- 13 A. Yes.
- 14 Q. And I show you an affidavit of yours that is sworn to.
- 15 A. Oh.
- 16 Q. January 25, 1972. Is that your signature?
- 17 A. Yes, it is.
- 18 Q. And I show you another affidavit also dated the same
- 19 day and ask you whether that is your signature?
- 20 A. Yes, it is.
- 21 Q. And I show you another affidavit of yours in which, -
- 22 which is also signed to January 25, 1972 and ask you
- 23 whether that is your signature?
- 24 A. Yes, it is.
- 25 Q. And you read those affidavits over before you signed

24

them, did you?

2 A. Yes.

3 Q. And as far as you knew, they were true and correct?

4 A. Yes.

5 Q. Now, referring to your first affidavit which deals with
6 your shopping of March 25, 1969, that was the one where
7 by mistake you said "1-A", the shopping took place at
8 1:00 a.m. instead of 1:00 p.m., is that right?

9 A. Oh, yes.

10 Q. Okay, and in that up near the top of the second page,
11 it says "I purchased the following items:", and under-
12 neath that it says Betty Gainer, clerk. Is that Betty
13 Gainer, clerk, supposed to be any part of that affidavit
14 based on your personal knowledge?

15 A. I don't understand.

16 Q. Well, do you know who put in those words, "Betty Gainer,
17 clerk"?

18 A. No.

19 Q. And does the name Betty Gainer, clerk, mean anything to
20 you or did it at the time you signed that affidavit?

21 A. No.

22 Q. And is the same also true of the next affidavit you
23 signed dealing with the shopping of March 26, 1969 where
24 up at the top of the second page somebody wrote in the
25 words "Betty Gainer, clerk". That doesn't mean anything

25

1 to you either, does it?

2 A. No.

3 Q. And you have no knowledge as to Betty Gainer, clerk, or
4 as to how or why it should be in the affidavit, do you? ✓

5 A. No.

6 Q. And you are not swearing to anything with reference to
7 Betty Gainer, clerk, just because her name appears in
8 this affidavit, are you?

9 A. Well, she is the clerk.

10 Q. Yes.

11 A. I suppose that is why, you know.

12 Q. I say you are not swearing she was the clerk and you
13 have no knowledge --

14 A. Oh, no, I didn't know her name, no. ✓

15 Q. And in your third affidavit, where you talk about the
16 shopping of March 27, 1969, up near the top of the
17 second page it says, "I purchased the following items:
18 John Cusack, manager". Now, I take it the fact that
19 those words "John Cusack, manager", are in there doesn't ✓
20 mean that you are swearing that he is the person that
21 you bought this merchandise from?

22 A. No, I didn't know his name.

23 Q. Okay. Also looking at those affidavits going back to
24 the first one covering the shopping of March 25, '69,
25 I notice that you are describing the checker, you say

1 the checker was female, Negro and was about twenty-one
2 years old, is that right?

3 A. Yes.

4 Q. And then going over to the second affidavit dealing with
5 the shopping that took place on March 26, 1969, did you
6 say this checker was Negro female and was about twenty-
7 five years old?

8 A. That probably was a mistake in hearing.

9 Q. Well, did you say that on this affidavit?

10 A. No. It was probably a mistake in hearing, in writing.

11 Q. Does the twenty-five years old appear on this affidavit?

12 A. Yes, it does.

13 Q. And you signed it and swore to it, did you not?

14 A. Yes.

15 MR. JAMES: Okay.

16 THE COURT: Mr. James, I think we will take a
17 short break.

18

19 (Short recess taken.)

20

21

22

* * * * *

23

24

25

1 PROCEEDINGS: After short recess.

2 APPEARANCES: As before noted.

3

4 ANNIE MAE CRUM, a Witness called by and in behalf
5 of the Defendant, having been previously duly sworn, resumed
6 the witness stand and testified further as follows:

7

8 THE COURT: All right, Mr. James, whenever you
9 are ready.

10 CROSS EXAMINATION BY MR. JAMES: (Resumed)

11 Q. About how long did it take you to get the items off
12 of the shelf on each of these shoppings that you did?

13 A. About fifteen or twenty minutes.

14 Q. And if you had to put them back, about how long would
15 it have taken?

16 A. Oh, about the same length of time.

17 MR. JAMES: Thank you. That is all I have.

18 THE COURT: Anything else, Mr. Burns?

19 MR. BURNS: No, no questions of this witness,
20 your Honor.

21 THE COURT: Thank you, Miss Crum.

22 MR. BURNS: The Government's next witness is
23 Mr. Cobb, previously sworn.

24

25

* * * * *

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

J.C.B. SUPER MARKETS, INC.
409 Niagara Street
Buffalo, New York

Plaintiff

- vs -

Civil 1970-232

UNITED STATES OF AMERICA, and
UNITED STATES DEPARTMENT OF AGRICULTURE

Defendants

APPEARANCES: HODGSON, RUSS, ANDREWS, WOODS & GOODYEAR
(GROVER R. JAMES, JR., of Counsel)
Buffalo, New York, for the Plaintiff.

RICHARD J. ARCARA, ESQ., United States Attorney
(THEODORE J. BURNS, ESQ., of Counsel)
Buffalo, New York, for the Defendants.

Plaintiff brought this action under 7 U.S.C. §2022 to obtain review of its disqualification from participation in the Food Stamp Program (7 U.S.C. §2011 et seq.) for a period of thirty days. On December 15, 1972 the court filed a decision and order denying defendants' motion for summary judgment [J.C.B. Super Markets, Inc. v. United States, 57 F.R.D. 500 (W.D.N.Y. 1972)].

The proceedings in this court were held pursuant to 7 U.S.C. §2022, which provides in pertinent part as

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follows:

. . . The suit in the United States district court . . . shall be a trial de novo by the court in which the court shall determine the validity of the questioned administrative action in issue. If the court determines that such administrative action is invalid it shall enter such judgment or order as it determines is in accordance with the law and the evidence.

In passing on the defendants' motion for summary judgment, this court noted:

. . . the use of the term "trial de novo" indicates a legislative intention to provide a scope of review not limited to that available under the general provisions of the Administrative Procedure Act, 5 U.S.C. §701 et seq. See 5 U.S.C. §706(2)(F). Consequently, in determining the validity of an action of disqualification, the court should make its own findings of fact based upon a preponderance of the evidence before it and not be limited to a consideration of the evidence presented in the administrative proceeding.
57 F.R.D. at 502, 503.

A trial was held and the following constitutes the findings of fact and conclusions of law based upon the trial record.

The plaintiff, J.C.B. Super Markets, Inc. [J.C.B.], was suspended from participation in the Food Stamp Program as a result of alleged violations which occurred on March 25, 26 and 27, 1969. At trial the government offered

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evidence about earlier violations at the store and of the notice given to J.C.B. to show that the plaintiff was aware of the regulations and knew of the importance of complying with them. Plaintiff argues that these earlier violations should not be admissible because Joseph Perna, John Perna and Joseph Cooper, the owners of J.C.B. at the time of the violations charged in this case, did not assume ownership until March 30, 1968 after most of the prior violations occurred. The original owners of J.C.B. were John C. Buscaglia and Anthony Sciolino, who operated the market at 409 Niagara Street, Buffalo, New York pursuant to a franchise agreement with Niagara Frontier Services, Inc. [N.F.S.], also known as Tops Markets. On March 14, 1966 Sciolino and Buscaglia applied for authorization to participate in the Food Stamp Program in behalf of J.C.B. A year or two later, after incurring considerable losses, they divested themselves of ownership and management of the store with N.F.S. taking over its operation. After negotiation with N.F.S., Mr. Perna and his associates began operation on March 30, 1968. They did not form a new corporation, but instead purchased the outstanding stock of J.C.B.

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During the trial, John L. Cobb, officer in charge of the Buffalo office of the United States Department of Agriculture, and Charles Close, a field representative, testified about the record of investigation of J.C.B. since the time of its authorization to participate in the Food Stamp Program on March 14, 1966. The first notice was sent on April 15, 1966 when Mr. Cobb sent a letter to Thomas Shanahan, attorney for Tops Markets, Inc., confirming a visit of April 14 in which he discussed the Food Stamp Program with Mr. Sciolino and Mr. Buscaglia. On September 29, 1967 Mr. Cobb sent a letter to the Tops Market at 409 Niagara Street, discussing a visit of September 1, 1967 in which certain ineligible items were included in the sales on that day. At the time of the September 1 visit, the department representative discussed the regulations with the manager. On October 4, 1967 when Mr. Close visited the store, he found that food stamps were exchanged for ineligible non-food items. He again discussed this matter with the store manager and another letter was sent on October 12, 1967. On March 18, 1968 an official warning letter was sent to Mr. H. Kosek, manager of the

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store, with a copy to Mr. Shanahan, confirming a February 2, 1968 visit when Mr. Close observed violations of the regulations. The letter advised:

In view of the continuing violation of regulations, please consider this as an official warning letter from the U. S. Department of Agriculture and if you are again found to be in violation of the regulations you may lose your authorization to accept food coupons.

The letter continued:

Our representative will visit your store again in the near future and expect to find that you are complying with the regulations in every respect.

After Mr. Perna and his associates took over the ownership and management of the store in March 1968, nothing further occurred until October 1968 when Mr. Close visited the store again and observed John Cusack make an irregular food stamp transaction. On December 2, 1968 another official warning letter was sent to the store to the attention of Joseph Perna, advising that a violation of the regulations would mean a loss of authorization to accept food coupons, and also advising Mr. Perna that a representative would visit the store in the near future to

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see if the store was complying with the regulations. The promised visits were made on March 25, 26 and 27, 1969 when Annie Crum, an investigator for the Department of Agriculture, shopped the store and reported that she purchased ineligible non-food items with food stamps. In early April 1969, three more attempts were made to purchase ineligible non-food items, but the clerks refused to sell the items at the time of these visits.

I am satisfied from the evidence that the shop-
pings of March 25, 26 and 27, 1969 were made and that on these occasions the investigative aide for the Department of Agriculture purchased the ineligible non-food items charged. On March 26, Betty Gainer, the clerk, told the investigator that she was not permitted to let her purchase ineligible items with food stamps, but she would let her have them anyway. Plaintiff argues that because the clerk knew that her conduct was unauthorized and against her employer's specific instructions, it ought not to be considered. Giving the greatest weight possible to this argument, it is not sufficient to excuse the violation. There is no evidence that Miss Gainer profited in any way by this

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transaction. She was acting for her employer, J.C.B., and it is bound by her actions. On March 27, Miss Crum purchased the articles from a male cashier. Because the government did not keep the cash register tapes, the plaintiff claims that it is unable to specifically identify the transaction. John Cusack, the manager, who was identified at trial as the individual who made the sale, cannot recall it. By failing to keep the record of the sale, the government places a difficult burden on the store owner to disprove an unfair charge. Nevertheless, from the evidence in this case, I am convinced that the purchase of non-food items was made on March 27 from Mr. Cusack.

As a result of these purchases, the Department sent a letter to plaintiff on May 14, 1969 charging that, on March 25 and 26, 1969, Betty Gainer, a clerk in the store, accepted food coupons in exchange for ineligible merchandise in violation of the regulations and, on March 27, John Cusack, the manager, committed similar acts. The letter explained that a reply could be submitted to the Buffalo office of the Department of Agriculture on or before

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May 27, 1969. On May 19, 1969 Mr. Perna presented a statement in mitigation and, on May 21, 1969, Mr. Cobb forwarded the file to the Northeast District, recommending that the store be disqualified for a period of thirty days. In Mr. Cobb's initial recommendation, he stated:

Viewing the case as involving a corporate entity . . . which has reflected a constant history of observed violations, a serious complaint, and an affirmative finding of ineligible sales . . . , I would recommend a six (6) months suspension based on an apparent store policy. On the other hand, Mr. Perna, the new franchised corporate president, had only one observed violation by our field office, and the O.I.G. investigation consisting of an equal mix of ineligible sales versus refusal to so participate. Thus I recommend a thirty (30) day suspension from the Program as an administration action which most nearly fits the situation.

The District Director recommended that the disqualification be increased to sixty days. The principal reason given for the increase was that a warning letter had been issued and the store manager had personally been involved in one violation. After plaintiff appealed this decision to the Food Stamp Review Officer, the disqualification was modified to thirty days. Before a final decision was reached, Peter Shambora, the Food Stamp Review

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Officer, came to Buffalo to meet with representatives of J.C.B. and also considered a further written argument. In his brief, the attorney for the plaintiff set forth in detail the reasons why a sixty-day disqualification was unduly harsh and disastrous to J.C.B. This action in the district court followed.

Under usual principles of law, the defendant correctly argues that the agency and the court are entitled to consider the prior history of violations of the Food Stamp Program and the warnings addressed to the store by the Department. This evidence shows that the operators of the store were aware of the regulations and the importance of complying with them. However, the corporation, not the individuals, was authorized to deal in food stamps. In addition, the agency sent warning letters to N.F.S., the franchisor of J.C.B. While this evidence may be considered, nevertheless, in fairness to the defendant, the record reflects that the reviewing officers did not charge Mr. Perna and his associates with the prior history except for the one occasion, which occurred in October 1968.

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Citing Martin v. United States, 459 F.2d 300 (6th Cir. 1972), Save More of Gary, Inc. v. United States, 442 F.2d 36 (7th Cir. 1971), and a number of district court cases, the government argues that the district court has no authority to consider the appropriateness of the penalty meted out by the agency. This court believes that the better view is expressed in the case of Cross v. United States (No. 74-1367, 4th Cir., Feb. 7, 1975) (en banc). In that case the circuit court decided that the district court in a "trial de novo" may reduce an administrative sanction under this section even though it concludes that the Secretary of Agriculture properly found that the act was violated.

The majority in the Cross case described the standard of review by the district court of the penalty meted out by the agency as follows:

. . . in those instances in which it may be fairly said on the de novo record as a whole that the Secretary, acting through

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his designates, has abused his discretion by acting arbitrarily or capriciously, would the district court be warranted in exercising its authority to modify the penalty.
Cross, supra at 15.

Judge Widener, concurring, would give the district court a wider range of review. He would permit the court to make its own independent judgment as to the term of disqualification within the limits of the regulations and the statutes. Cross, supra at 16-24.

Joseph Perna testified at the trial about the severe economic hardship which would be visited upon the store by a thirty-day disqualification. The store is located in an area of the city where many of its customers use food stamps. In early 1973 about ten-and-a-half percent of its business was made up of food stamp sales. In addition, the food stamp customers also made substantial purchases using cash. Mr. Perna estimated that if its right to sell merchandise to food stamp customers was suspended, it would lose at least thirty percent of its gross sales. He feared that if the store was disqualified for a period of thirty days, it might not be able to stay

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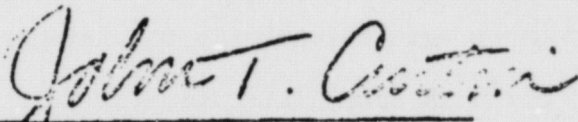
in business at that location and, if it did, it would take about a year to a year and a half to recover the lost sales volume. I have also considered as part of the evidence the presentations made to the agency by J.C.B. which set forth in detail its argument that a disqualification would impose a drastic hardship. However, the dire consequences prophesied by Mr. Perna are his opinion only and not supported by independent evidence.

Considering the evidence in this case in accordance with the standard expounded by Judge Widener in his concurring opinion in the Cross case leaves the plaintiff without a remedy. Without question, a thirty-day suspension will be a serious blow to the financial fortunes of J.C.B.; nevertheless, all of these factors were weighed carefully during the administrative review. Viewing the facts of this case in the light of the regulations, the plaintiff has failed in its burden of persuading the court that the agency action should be set aside.

The Clerk is directed to enter judgment in favor of the defendants dismissing the complaint.

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So ordered.



JOHN T. CURTIN
United States District Judge

.. DATED: June 10, 1975

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Stipulation.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

J. C. B. SUPER MARKETS, INC.

Plaintiff/Appellant

vs.

UNITED STATES OF AMERICA and
UNITED STATES DEPARTMENT OF
AGRICULTURE

Defendants/Respondents

CIVIL ACTION
NO. 1970-232

DOCKET NO. 75-6063

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EXHIBITS

PLAINTIFF'S EXHIBITS

1. Exhibit 3 List of food stamp sales, December 1971, January, February 1972.
2. Exhibit 4 Compilation of total sales, December 21, 1969 - September 20, 1969.
3. Exhibit 6 Financial Statement, June 28, 1969.
4. Exhibit 7 Financial Statement from September 26, 1969 to September 26, 1970.
5. Exhibit 8 Financial Statement from September 1970 to September 25, 1971.
6. Exhibit 9 Financial Statement from September 1971 to September 20, 1972.
7. Exhibit 11 Financial Statement March 31, 1973.

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DEPENDANTS' EXHIBITS

1. Exhibit 1 Application for authorization
2. Exhibit 2 Checklist for Retailer Review, April 14, 1966.
3. Exhibit 3 Confirming letter, April 15, 1966.
4. Exhibit 4 Educational visit checklist, September 1, 1967.
5. Exhibit 5 Confirming letter, September 29, 1967.
6. Exhibit 6 Educational visit checklist, October 4, 1967.
7. Exhibit 7 Confirming letter, October 12, 1967.
8. Exhibit 8 Educational visit checklist, February 2, 1968.
9. Exhibit 9 Warning letter, March 18, 1968.
10. Exhibit 10 Educational visit checklist, October 23, 1968.
11. Exhibit 11 Warning letter, December 2, 1968.
12. Exhibit 15 Investigation report, April 24, 1969.
13. Exhibit 16 Letter of charges, May 14, 1969.
14. Exhibit 17 Case summary, JCB Super Market, Inc.
15. Exhibit 18 District recommendation, June 9, 1969.
16. Exhibit 19 Letter, undated, to John Cusack, from Director, Northeast District.
17. Exhibit 20 Letter, July 16, 1969, Mr. Perna to Food Stamp Review Officer.
18. Exhibit 21 Letter, July 27, 1969, Mr. Shambora to Mr. Perna.
19. Exhibit 22 Letter, July 24, 1969, Mr. Parone to Mr. Shambora.
20. Exhibit 23 Letter, September 15, 1969, Mr. Shanahan to Mr. Shambora.
21. Exhibit 24 Letter, September 23, 1969, Mr. Shambora to Mr. Shanahan.

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Stipulation.

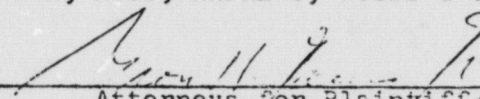
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- 22. Exhibit 25 Letter, October 10, 1969, Mr. Shanahan to Mr. Shambora.
- 23. Exhibit 26 Letter, October 21, 1969, Mr. Shanahan to Mr. Shambora.
- 24. Exhibit 27 Letter, May 6, 1970, Mr. Shambora to Mr. Shanahan.

It is stipulated that the papers listed on the attached list, and the exhibits referred to therein shall constitute the record on appeal in this action.

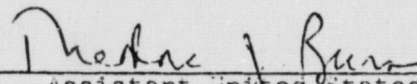
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